

EXHIBIT B

[PUBLIC VERSION]

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Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF WYOMING

3 -----:
4 CUSTODIA BANK, INC., :
5 :
6 Plaintiff, :
7 : Case No.
8 vs. : 1:22-cv-00125-SWS
9 :
10 FEDERAL RESERVE BOARD OF :
11 GOVERNORS and FEDERAL RESERVE :
12 BANK OF KANSAS CITY, :
13 :
14 Defendants. :
15 -----:

16 CONFIDENTIAL DEPOSITION OF
17 PETER CONTI-BROWN, PH.D.

18 DATE: Thursday, December 14, 2023
19 TIME: 8:09 a.m.
20 LOCATION: King & Spalding, LLP
21 1700 Pennsylvania Avenue, N.W.
22 Washington, D.C. 20006
23 Reported by
24 REPORTED BY: Erick M. Thacker
25 Reporter, Notary

26 Veritext Legal Solutions
27 1250 Eye Street, NW, Suite 901
28 Washington, D.C. 20005

CONFIDENTIAL

Page 32

1 opinion that the Federal Reserve does not have
2 the discretion to both define its monetary policy
3 space and then to exclude legally eligible,
4 state-chartered depository institutions from its
5 priced services in service of that monetary
6 policy space.

7 Q And do you understand that what -- what
8 Congress intended to accomplish in the Monetary
9 Control Act is -- is a legal dispute in this
10 case?

11 A No.

12 MR. SCARBOROUGH: Objection to form.

13 THE WITNESS: I don't understand that,
14 no.

15 BY MR. MICHAELSON

16 Q Okay. You -- you're a lawyer, right?
17 You went to law school?

18 A I did go to law school, yes.

19 Q And you -- you clerked for a judge,
20 two, correct?

21 A For two judges, yes.

22 Q For two judges. So how -- how do

CONFIDENTIAL

Page 33

1 courts go about interpreting statutes?

2 MR. SCARBOROUGH: Objection.

3 THE WITNESS: I don't know how -- you
4 know, this is the subject of great scholarly
5 debate, how they do, how they should. Courts are
6 different in different ways.

7 I'm not offering -- the reason I
8 don't -- I didn't agree with your earlier
9 question is that I -- I offer my expertise here
10 as a historian of banking, and I'm not offering
11 an opinion on the legal interpretation of the
12 statute. And so the intentions of the statutory
13 framers, while maybe useful to the Court in terms
14 of interpreting specific provisions, my -- of
15 the -- of the statute, that I would regard as a
16 legal dispute.

17 What I'm offering is a perspective on
18 the Fed's history from 1913 to 1980, how members
19 of Congress and others understood the changes
20 that occurred in 1980, and then how the Federal
21 Reserve understood and implemented those changes
22 from 1980 to 2015, and then, finally, how it

CONFIDENTIAL

Page 34

1 understood in different ways those
2 implementations from 2015 to the present.

3 I regard those as relevant to my
4 expertise as a business professor and as a
5 financial historian. And while I'm very glad
6 that I went to law school -- I had a good time
7 there and enjoyed working for those judges --
8 that was not a legal interpretation that I offer
9 in my report.

10 Q All right. Let's take a look at --
11 we'll take a break about every hour, and if you
12 ever need a break, just let me know.

13 A Okay. Sounds good.

14 MR. MICHAELSON: So we'll mark this
15 as -- you'll be pleased to hear we bought your
16 textbook. We'll mark this as exhibit -- is it
17 280 --

18 THE REPORTER: 298.

19 MR. MICHAELSON: 298?

20 MR. SCARBOROUGH: Yes.

21 (Deposition Exhibit Number 298 was
22 marked for identification.)

CONFIDENTIAL

Page 62

1 evaluating the component parts because I don't
2 grant the premise that it can engage in that sort
3 of assessment.

4 Q Right. Your position is that it's --
5 they're prohibited by law from denying the
6 request?

7 A No, I don't offer a legal opinion.
8 I'll leave that to the Court and to the lawyers.
9 I'm saying that the framers of the MCA and the
10 Federal Reserve itself after its passage did not
11 intend or act in a way that suggested it had the
12 ability to engage in precisely these kinds of
13 assessments.

14 Q Okay. So you're saying that the
15 decision to deny the master account request is
16 inconsistent with the intent of the Congress that
17 passed the Monetary Control Act?

18 A In part, yes.

19 Q And you're saying that it's -- the
20 decision to deny is inconsistent with the Federal
21 Reserve's practice following passage of the
22 Monetary Control Act?

CONFIDENTIAL

Page 105

1 bill's sponsors.

2 Q Okay. And you -- you'd agree that the
3 presentation of legislative history on the
4 Monetary Control Act reflected in your opinion is
5 not complete, correct?

6 MR. SCARBOROUGH: Objection.

7 THE WITNESS: Can you define for me
8 what a complete legislative history would be?

9 BY MR. MICHAELSON

10 Q Well, isn't it the case that part of
11 the legislative history of the Monetary Control
12 Act reflects a concern among Congress that the
13 percentage of banks or Fed members was declining?

14 A That was the concern of some members of
15 Congress, no question.

16 Q All right. Federal membership was
17 declining, correct?

18 A That's right.

19 Q And that was a concern for banking
20 regulators, correct?

21 A For -- the decline in Fed membership
22 rates was a concern for some bank regulators, not

CONFIDENTIAL

Page 106

1 all.

2 Q And what was the concern?

3 A The concern here was that in the fall
4 of 1979, the Federal Open Market Committee
5 launched a wholesale reorientation of its
6 monetary policy regime that required more
7 varieties of -- of efforts to control monetary
8 policy. And Paul Volcker's concern and the
9 concern of some others that the Federal Reserve,
10 although not a concern shared by all, was that
11 the ability to manage this new monetary policy
12 system was limited by the decline in Fed
13 membership.

14 Q And so -- so fair to say that
15 Volcker's -- well, Volcker's concern was that
16 declining Fed membership could impair the Federal
17 Reserve's ability to implement monetary policy?

18 A That's right.

19 Q And so one purpose of the Monetary
20 Control Act was to reinforce the Federal
21 Reserve's ability to implement monetary policy?

22 A That's right.

CONFIDENTIAL

Page 117

1 a particular service between 1980 and 2015?

A For solvent institutions --

3 Q For solvent institutions.

A -- that did not fail? Again, the instance of the -- the hijacked Central Bank of Bangladesh instance, which would have been a master account holder with a transaction that was blocked, so that would be an example. That may have been after 2015, though. I can't -- I can't recall.

11 Q And how about not an actual assertion
12 of this power, but a -- but a claim to this
13 power? And that I mean the power to terminate
14 access to a service for a solvent institution.

15 A I have not seen that claim, and I did
16 not see that claim until 2015, in the instance of
17 the Fourth Corner Credit Union.

18 MR. MICHAELSON: Okay. Let's look
19 at -- we'll just do one more document before we
20 break here. Mark this as Exhibit 301, I guess.

21 (Deposition Exhibit Number 301 was
22 marked for identification.)

CONFIDENTIAL

Page 118

1 BY MR. MICHAELSON

2 Q So I put in front of you a document
3 marked Exhibit 301, which is a document from the
4 Federal Reserve Bank of Dallas, and it attaches,
5 beginning the fourth page, a publication from the
6 Federal Register.

7 Do you see that?

8 A I do see that.

9 Q And this is Federal Register, Volume
10 50, No. 99, page 21120, titled "Policy Statement
11 Regarding Risks on Large Dollar Wire Transfer
12 Systems."

13 Do you see that?

14 A I do.

15 Q This is a policy that is set with an
16 effective date in 1986.

17 Do you see that?

18 A I do.

19 Q Okay. And, actually, the Fed Register
20 notice is at the top of the page. It's May 22nd,
21 1985. Do you see this? Do you see that?

22 A Where are you --

CONFIDENTIAL

Page 119

1 Q Just at the top of the page.

2 A Oh, yeah. I see it. Yeah.

3 Q Okay. Is -- earlier you referred to a
4 policy statement from around this time period
5 regarding money transfers.

6 Is this the policy that you were
7 referring to?

8 A It is.

9 Q Okay. So you're familiar with this
10 policy?

11 A I am.

12 Q You've seen it before?

13 A I have.

14 Q And it's -- and it's public?

15 A It is.

16 Q What -- what is daylight -- what are
17 daylight overdrafts?

18 A I'm not exactly sure of the precise
19 definition. My general sense is that an
20 overdraft that occurs in the same day with
21 additional transactions being ordered on that
22 same account during that same day, but I'm not

CONFIDENTIAL

Page 120

1 certain that that's true.

2 Q Okay. I'll refer you to page 21123.

3 In the bottom -- bottom right-hand corner, this
4 provides, "The Board is still concerned with
5 these overdrafts, and believes that it is
6 appropriate to take effective steps to control
7 risks to the Federal Reserve Banks by placing
8 more effective limits on Fedwire daylight
9 overdrafts."

10 Do you see that?

11 A I do.

12 Q Okay. And do you agree that -- that
13 this -- this policy is -- was public at the time?

14 A Yes.

15 Q And it reflects an assertion of Federal
16 Reserve authority to impose conditions and
17 restrictions on access to priced services?

18 MR. SCARBOROUGH: Objection to form.

19 THE WITNESS: Again, I would say that I
20 see the word "conditions" and "regulations" as
21 performing very different purposes for the Fed's
22 assertions of authority. I hear this as creating

CONFIDENTIAL

Page 121

1 regulation rather than conditionality, which I
2 would regard as -- conditions I would think of as
3 more bespoke and idiosyncratic.

4 I hear -- I see in this document the
5 regulation and the record of that regulation even
6 as it's described as a policy statement in the
7 Federal Register for rules that apply to the
8 entire system as opposed to conditions placed on
9 individual account holders.

10 Q But -- but doesn't this regulation
11 reflect an assertion of the Federal Reserve to
12 restrict individual institutions access to
13 services based on risk presented by that
14 institution?

15 MR. SCARBOROUGH: Objection to form.

16 THE WITNESS: I don't think I
17 understand how that -- how your last statement
18 would be correct in the sense -- so the -- the
19 conditions that I've seen the Federal Reserve
20 impose on an account holder's master account are
21 the most -- the most striking example is with the
22 American Samoa Bank. Those I would regard as

CONFIDENTIAL

Page 137

1 claiming the power to conduct such risk
2 assessments, correct?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: The -- I read Exhibit 301
5 to contain a regulation regarding what the Fed
6 shall do in the event of daylight overdrafts and
7 what to do to manage the question of daylight
8 overdrafts.

9 BY MR. MICHAELSON

10 Q Okay. And to prohibit the use of
11 Fedwire where an institution's use of Fedwire
12 would prevent risk to the Reserve Bank?

13 MR. SCARBOROUGH: Objection.

14 THE WITNESS: Again, just reading from
15 it, I would say that the 1985 policy statement
16 has a regulation that asserts the Reserve Bank's
17 right to protect its risk exposure from those --
18 those banks.

19 BY MR. MICHAELSON

20 Q Okay. I'm handing you a document
21 marked Exhibit 302, which is Operating Circular 1
22 from 1998.

CONFIDENTIAL

Page 138

1 Are you familiar with OC1?

2 A I am.

3 Q And have you seen -- this is from 1998.

4 Have you seen this version before?

5 A I have.

6 Q And this was public, right?

7 A It -- it is.

8 Q Okay. I'd direct your attention to
9 Section 1.1, called "Scope."

10 Third paragraph, it says, "Your master
11 account is subject to Federal Reserve policies
12 such as those on payment system risk, reserve
13 balances and clearing balances as they may be
14 revised from time to time."

15 Do you see that?

16 A I do.

17 Q And this is a reference to policies
18 like the statement on large dollar wire transfers
19 that we were just looking at?

20 A That's right.

21 Q Okay. So this -- this is also another
22 example of the Federal Reserve asserting the

CONFIDENTIAL

Page 139

1 power to -- asserting the power to decide whether
2 to grant use of priced service, correct?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: No.

5 BY MR. MICHAELSON

6 Q Well, it's -- it's -- it's saying that
7 your master account is subject to the policy that
8 we were just looking at, right?

9 A That's right.

10 Q And in that policy, the Federal Reserve
11 asserted the authority to conduct risk
12 assessments to protect -- for the purpose of
13 protecting Reserve Banks from risk presented by
14 individual institutions, right?

15 MR. SCARBOROUGH: Objection.

16 THE WITNESS: That's right.

17 BY MR. MICHAELSON

18 Q Okay. And where risk was presented,
19 the Federal Reserve was claiming the authority to
20 cut off use of Fedwire to mitigate risk, correct?

21 MR. SCARBOROUGH: Objection.

22 THE WITNESS: Again, we have a

CONFIDENTIAL

Page 140

1 different view on -- on the question of what
2 constitutes cutoff. And why I said no to my --
3 in my answer to your first question was because
4 you used the word "grant," which I took to be a
5 verb indicating access.

6 I don't read the 1985 policy statement
7 and don't see in the '98 Operating Circular 1 the
8 assertion that the Fed could reimpose discretion
9 as it has with Fed membership status on access to
10 accounts before 1998 and the master account
11 thereafter.

12 BY MR. MICHAELSON

13 Q Okay. I'll refer you to Section 2.3,
14 entitled "Establishing a Account," and the last
15 sentence of the first paragraph is "All master
16 accounts are subject to Reserve Bank approval."

17 Do you see that?

18 A I do.

19 Q So as of 1998, the Federal Reserve was
20 taking the position that master accounts are
21 subject to approval by a Reserve Bank?

22 A That's right.

CONFIDENTIAL

Page 141

1 Q And in Section 2.8 on the following
2 page, on the right-hand side of the page, middle
3 of top paragraph there, there's a sentence that
4 reads, "We may close your master account or
5 terminate our approval of a pass-through
6 relationship at any time."

7 Do you see that?

8 A I do see that.

9 Q So as of 1998, the Federal Reserve was
10 asserting the power to close an institution's
11 master account at any time?

12 A That's right.

13 MR. MICHAELSON: All right. Let's mark
14 this.

15 (Deposition Exhibit Number 303 was
16 marked for identification.)

17 BY MR. MICHAELSON

18 Q I've put in front of you a document
19 marked 303. It's an exhibit marked 303. It's
20 federal -- from the Federal Register, entitled
21 "Policy on Payments System Risk," Federal
22 Register, Volume 69, No. 230, 69926. This is

CONFIDENTIAL

Page 142

1 dated December 1, 2004.

2 Do you see that?

3 A I do.

4 Q Are you familiar with this policy on
5 payment system risk from 2004?

6 A Generally speaking, yes. I haven't
7 examined it thoroughly.

8 Q When's the last time you reviewed it?

9 A I glanced at it yesterday. Before
10 that, it had been -- it had been several months.

11 Q Okay. Direct your attention to the
12 page 69929. On the far left -- left column,
13 first full paragraph, it says, "Part II of this
14 policy governs the provision of intraday or
15 daylight credit in accounts of the Reserve
16 Banks."

17 Do you see that?

18 A I do.

19 Q And it says that it "sets out the
20 general methods used by the Reserve Banks to
21 control their intraday credit exposures."

22 Do you see that?

CONFIDENTIAL

Page 146

1 Do you know what this refers to?

2 A I know in general terms what
3 constitutes regular access to the discount
4 window. I have a general sense of what a net
5 debit cap is, but I don't know what the
6 qualification for a filing exemption is.

7 Q Okay. Go ahead to 69937. The upper
8 left corner, the last sentence of the -- of the
9 paragraph in the upper left corner, it says, "For
10 example, if the institution's level of daylight
11 overdrafts constitutes an unsafe or unsound
12 banking practice, the Reserve Bank would likely
13 assign the institution a zero net debit cap and
14 impose additional risk controls."

15 Do you see that?

16 A I do.

17 Q Would you agree that this reflects the
18 Federal Reserve's assertion of power over use
19 of -- no, strike that.

20 Would you agree that this reflects, as
21 of 2004, the Federal Reserve's assertion of power
22 over the use of priced service?

CONFIDENTIAL

Page 147

1 A Over its use, yes.

2 Q Okay. Including the power to impose
3 risk controls to mitigate risk to the Reserve
4 Bank?

5 A If we're defining zero in the net debit
6 cap and as a risk control, which the policy
7 statement seems to do, then yes.

8 Q Okay. Are you familiar with OC3,
9 Operating Circular 3?

10 A Not by its name.

11 Q But do you have a general understanding
12 of what OC3 relates to?

13 A No. I would need to review it.

14 Q When's the last time that you reviewed
15 OC3?

16 A If you could -- if I could see it, I
17 could tell you. I don't know what OC3 -- I mean,
18 I know it's an operating circular, but I would
19 need to see it before I could answer the
20 question.

21 Q Okay. How about OC4? Do you know what
22 OC4 is?

CONFIDENTIAL

Page 149

1 to legally eligible depository institutions,
2 correct? That's your -- that's your opinion
3 here?

4 A That's right.

5 Q But would you agree that between 1980
6 and 2015, the Federal Reserve was asserting the
7 power to decide whether all priced services would
8 be available to all legally eligible,
9 state-chartered depository institutions?

10 MR. SCARBOROUGH: Objection to form.

11 THE WITNESS: No, I would not. I would
12 say that between 1980 and 2015, at several
13 different junctures, the Federal Reserve issued
14 policy statements and regulations governing the
15 general provision of its priced services,
16 including some regulations that governed the use
17 of those services.

18 The statement that I make -- the
19 opinion that I offer in paragraph 59 of my report
20 refers to the idiosyncratic decisions to grant
21 priced services to individual legally eligible
22 depository institutions.